

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUAN CASTANON and DEPARTMENT OF THE ARMY,
FORT SAM HOUSTON, TX

*Docket No. 00-1354; Submitted on the Record;
Issued April 26, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant has established a permanent impairment entitling him to a schedule award under 5 U.S.C. § 8107; and (2) whether the Office of Workers' Compensation Programs, by its November 18, 1999 decision, abused its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

On April 10, 1997 appellant, then a 52-year-old machinist, filed a traumatic injury claim alleging that on that date he sustained a laceration on the left side of his head when he struck his head on a drill bit while cleaning a radial arm drill press. The Office accepted appellant's claim for a superficial laceration of the left side of his head and a closed-head injury and authorized appropriate compensation.

On August 7, 1999 appellant filed a claim for a schedule award.

The record contains a report dated April 30, 1997, in which Dr. James Remkus, Board-certified in internal medicine, advised that computed tomography of appellant's head revealed that there was no evidence of intracranial hemorrhage or mass effect.

In a report dated May 7, 1997, Dr. Allen Gruber, a Board-certified neurologist, provided a history of appellant's April 10, 1997 employment injury. He noted that appellant complained of headaches, sound sensitivity, confusion and moodiness. Dr. Gruber noted his objective examination findings and diagnosed a closed-head injury with a possible lateral flexion injury. In progress notes dated May 22 to September 18, 1997, he noted appellant's complaints, his objective findings and treatment.

In a progress note dated June 8, 1998, Dr. B. Peyton Delaney, a Board-certified psychiatrist and neurologist, opined that appellant could not return to his previous position as a machinist and he recommended psychiatric treatment.

The record also contained a report dated June 17, 1997, in which Dr. Philip Bronowitz, Board-certified in internal medicine, gave a history of appellant's April 10, 1997 employment injury, stated appellant's subjective complaints and noted his objective findings. Dr. Bronowitz noted that appellant had memory and concentration problems and that he continued to have periodic headaches. He diagnosed postconcussive syndrome, glaucoma by history and hypertriglyceridemia/hyperlipidemia by history. In attending physician's reports dated June 3 to December 31, 1997, Dr. Bronowitz noted posterior headaches, cognitive and memory impairment, dysphoria and psychomotor dysfunction. He diagnosed a closed-head injury with severe postconcussive syndrome.

In a report dated August 19, 1997, Dr. Richard Dahlen, a Board-certified diagnostic radiologist, stated that magnetic resonance imaging revealed mild chronic inflammatory changes of the bilateral maxillary and ethmoid sinuses and minimal small vessel ischemic changes.

The record contains numerous notes and reports dated December 15, 1997 to October 18, 1999 from Dr. Richard C. Senelick, a Board-certified neurologist, noting appellant's symptoms and treatment. In his report dated December 15, 1997, Dr. Senelick provided a history of appellant's April 10, 1997 injury, noted appellant's complaints and stated his objective findings. He stated that appellant's symptoms included headaches, fatigue, drowsiness, depression and decreased concentration. Dr. Senelick diagnosed a mild-head injury with persistent postconcussive syndrome. In his February 13, 1998 note, he stated that neuropsychological testing results were consistent with severe distress syndrome with depression, anxiety and attention, concentration and memory deficits. In his notes dated August 31 and October 5, 1998, Dr. Senelick opined that appellant's prescribed Viagra use was related to his head injury secondary to depression. In his report dated November 16, 1998, Dr. Senelick referred to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, third edition, pages 97 and 100 and found that appellant sustained the following impairments: (1) 30 percent whole body impairment for category II disturbances of complex integrated cerebral function; (2) 30 percent whole body impairment for category II emotional disturbances; and (3) 10 percent impairment for category I sexual dysfunction. Using the Combined Values Chart, he found that appellant had a 37 percent total whole person impairment and that he reached maximum medical improvement on November 16, 1998.

By decision dated August 13, 1999, the Office denied appellant's schedule award claim on the grounds that the medical evidence of record did not refer to an impairment of a scheduled member or function of the body as set forth in section 8107 of the Federal Employees' Compensation Act.¹ The Office noted appellant's entitlement to medical benefits.

By letter dated October 24, 1999, appellant requested reconsideration.

By decision dated November 18, 1999, the Office denied appellant's reconsideration request on the grounds that it did not clearly identify the basis for the request and it was not supported by relevant evidence or legal contentions not previously considered. The Office stated that the Act did not provide for a schedule award for the head or brain.

¹ 5 U.S.C. § 8107.

The Board notes that appellant submitted additional evidence subsequent to the Office's November 18, 1999 decision, however, the Board's jurisdiction to consider and decide from final decisions of the Office is limited to reviewing the evidence that was before the Office at the time of its final decision.²

The Board finds that appellant is not entitled to receive a schedule award.

Section 8107 of the Act³ provides that, if there is a permanent disability involving the loss, or loss of use, of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁴ However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office and the Board has concurred in such adoption, as an appropriate standard for evaluating scheduled losses.⁵

As noted above, the schedule award provisions under the Act are limited to specific members or functions of the body enumerated under 5 U.S.C. § 8107 and its implementing regulation. A schedule award is not payable for loss, or loss of use, of any member of the body not specifically enumerated,⁶ nor is it payable for the body as a whole.⁷ Because the head and brain are not scheduled members, appellant is not entitled to receive a schedule award for his condition. Similarly, the Act does not provide for a schedule award for emotional conditions.⁸

The Board further finds that the Office, by its November 18, 1999 decision, did not abuse its discretion by denying appellant's request for further merit review under 5 U.S.C. § 8128(a).

In order to warrant a grant of a claimant's reconsideration request, the claimant must show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office.⁹ Where such evidence and arguments are present, it is well established under Board precedent that the Office must reopen a

² 20 C.F.R. § 501.2(c).

³ 5 U.S.C. § 8107(c).

⁴ *Id.* This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid. Additional members of the body are found at 20 C.F.R. § 10.404.

⁵ *Thomas P. Gauthier*, 34 ECAB 1060, 1063 (1983).

⁶ *Thomas E. Stubbs*, 40 ECAB 647 (1989).

⁷ *James E. Mills*, 43 ECAB 215 (1991).

⁸ *Ann L. Tague*, 49 ECAB 453 (1998).

⁹ *Alton L. Vann*, 48 ECAB 259, 269 (1996); 20 C.F.R. § 10.606(b)(2).

case for further merit review.¹⁰ Section 10.608(b) of the Office's regulations provides that, when an application for review of the merits of a claim does not meet at least one of those requirements, the Office will deny the application for review without reviewing the merits of the claim.¹¹ The submission of evidence or argument which repeats or duplicates evidence or argument already considered by the Office does not constitute a basis for reopening a case for further review on the merits.¹²

In its November 18, 1999 decision, the Office properly denied appellant's reconsideration request because he did not show that the Office erroneously applied or interpreted a point of law, advance a new legal argument supporting his claim not previously considered by the Office, or submit relevant and pertinent new evidence not previously considered by the Office. Appellant did not submit any medical evidence to support his request. He merely described his work-related injury and his subsequent medical treatment. Therefore, his request was insufficient to warrant further merit review.

The November 18 and August 13, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
April 26, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

¹⁰ *Helen E. Tschantz*, 39 ECAB 1382, 1385 (1988).

¹¹ 20 C.F.R. § 10.608(b).

¹² *David E. Newman*, 48 ECAB 305, 308 (1997); *see Eugene F. Butler*, 36 ECAB 393, 398 (1984).